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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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CLARENDON NATIONAL INSURANCE COMPANY and CLARENDON AMERICA INSURANCE COMPANY,

Plaintiffs and Counter-Defendants,

v.

TRUSTMARK INSURANCE COMPANY,

Defendant and Counter-Plaintiff.

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Civil Action No. 09-cv-9896

CLARENDON'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR A PROTECTIVE ORDER, FOR SATISFACTION OF JUDGMENT UNDER RULE 60(B)(5), AND FOR A STAY UNDER RULE 62(B)(4)

INTRODUCTION

Defendant Trustmark Insurance Company ("Trustmark") is attempting to execute on a judgment that plaintiffs Clarendon National Insurance Company and Clarendon America Insurance Company (collectively "Clarendon") contend they have already satisfied. That very issue – whether Clarendon has satisfied Trustmark's judgment—is the subject of the declaratory action before this Court. Trustmark, unwilling to let this Court decide the issue of Clarendon's satisfaction of the judgment, secured a ministerial writ of execution from the clerk of this Court without notice to the Court or Clarendon. *See Trustmark Ins. Co. v. Clarendon Nat'l Ins. Co.*, No. 1:11-mc-00006-P1 (S.D.N.Y.) [Docket No. 3]. Clarendon brings this motion to prevent Trustmark from seizing assets to satisfy a judgment that they contend has already been paid. The Court should prevent Trustmark from making Clarendon's declaratory judgment claim moot, a claim that the court that entered the judgment Trustmark seeks to enforce directed Clarendon to file. Trustmark should not be able to make an end-run around this Court's authority to decide the issue of Clarendon's satisfaction, particularly when Clarendon has proposed a means of ensuring that Trustmark would be paid in the event that the Court holds that Clarendon has not already satisfied the judgment. The relief sought herein is appropriate under both N.Y. C.P.L.R. § 5240 and Rules 60 and 62 of the Federal Rules of Civil Procedure.

FACTS

Clarendon and Trustmark entered into various Settlement Agreements under which Trustmark was obligated to pay Clarendon over $10.1 million. (Redpath Decl. Exs. 30, 31, 33, 35, 36 & 38.)[1] Instead of Trustmark paying cash, Clarendon agreed that Trustmark could

[1] These issues have been extensively briefed in Clarendon's Brief in Support of Its Motion for Summary Judgment (Docket No. 66). Therefore citation is made to the Declaration of Robert Redpath filed in support of that motion (Docket No. 67) ("Redpath Decl."). Clarendon also cites to the Affidavit of Robert A. Scher Demonstrating the Necessity of Proceeding by an Order to Show Cause ("Scher Aff."), and attached exhibits, filed herewith.

satisfy those obligations by offset against disputed amounts Trustmark claimed from Clarendon under the 1998 International Treaties and the 1998 VQS Treaty. (*Id.* Exs. 26, 35, 37, & 39.) From 2007 through 2009, Trustmark and Clarendon arbitrated their disputes about the amount Clarendon owed to Trustmark under the 1998 International Treaties. In the course of that arbitration, Trustmark removed all credit for offsets (yet still claims that it has satisfied its obligations to Clarendon under the Settlement Agreements) and told the arbitration panel that it only could enter an award without regard for offsets. (*Id.* Ex. 93.) The arbitration panel issued an award granting Trustmark $6.6 million, a drastic reduction from the over $40 million Trustmark had sought. (*Id.* Ex. 44.) Because Trustmark still owed Clarendon over $10.1 million, Clarendon informed Trustmark that it was satisfying the award by offsetting the $6.6 million owed against the larger amount Trustmark owed to Clarendon. (*Id.* Ex. 94.) Trustmark refused to accept this common-sense application of offset.

Trustmark is seeking to enforce a judgment confirming the $6.6 million arbitration award, entered by Judge Coar of the Northern District of Illinois. Clarendon did not object to confirmation of the award, so long as it was recognized that Clarendon had already satisfied the award. Judge Coar confirmed the award but declined to resolve the issue of whether Clarendon has satisfied the award, saying that the issue should be raised "in a proceeding to enforce the judgment or a separate action (for example, a declaratory judgment action) to determine whether setoff is appropriate and, if so, whether and/or when any setoff occurred." *Trustmark Ins. Co. v. Clarendon Nat'l Ins. Co.*, No. 09 C 1673, 2009 WL 4043110, *4 (N.D. Ill. Nov. 20, 2009). Following that ruling, Clarendon filed this case, exactly the declaratory action proposed, which has now progressed through discovery and summary judgment briefing.

On January 7, 2011, over one year after this case was filed and in the midst of summary judgment briefing on the very issue of whether Clarendon had satisfied the arbitration award by offset, Trustmark filed a "miscellaneous" action in this court registering the judgment from the Northern District of Illinois that confirmed the arbitration award. *See Trustmark Ins. Co. v. Clarendon Nat'l Ins. Co.*, No. 1:11-mc-00006-P1 (S.D.N.Y.). Trustmark made no attempt to indicate the "miscellaneous action" was related to this action. In a ministerial act, and without involvement by this Court, the clerk issued a writ of execution on the judgment. (*Id.* [Docket No. 3]; Scher Aff. Ex. A.) When Clarendon asked Trustmark to hold off on executing in order to allow this litigation to proceed, Trustmark responded that it believed Clarendon was a collection risk because A.M. Best placed Clarendon's rating under review (as is customary) due to Clarendon's pending sale. (Scher Aff. Ex. C.) On January 21, the United States Marshals Service had served a levy of execution on Clarendon. (Scher Aff. Ex. D.)

The Court conducted a pre-motion conference on January 25 at which it suggested that the parties resolve the issue by Clarendon providing collateral to Trustmark in the form of a bond. After the hearing, Clarendon learned that the Marshals Service had served a levy of execution on Clarendon bank account at JP Morgan Chase Bank. (Scher Aff. Ex. E.) The effect of this under state law is to freeze those accounts and obligate JP Morgan Chase to pay the money to the Marshal. *See* N.Y. C.P.L.R. § 5232. Clarendon offered to resolve Trustmark's assertions over any potential credit risk by agreeing to keep the account freeze in place (per a restraining order under N.Y. C.P.L.R. § 5222) on the $8.9 million Chase account, for Trustmark to cease all other collection efforts, and to wait until this Court resolves the underlying issue of whether Clarendon has already satisfied the arbitration award before any payments would be made out of the Chase account. (Scher Aff. Ex. F.) Trustmark has not agreed to this common sense solution. (*Id.* ¶ 9.) Clarendon therefore moves the Court for a protective order preventing, or at a minimum staying, Trustmark's efforts to collect on a judgment that Clarendon has already satisfied.

I. LEGAL STANDARDS

The Court should take jurisdiction over the miscellaneous action in which the writ of execution was issued because the miscellaneous action is intertwined with the issues in this case. *See Application of CBS, Inc.*, 663 F. Supp. 1011, 1012 n.1 (S.D.N.Y. 1987) (accepting miscellaneous case because it was related to action pending before the court). Because Clarendon's long-pending complaint for a declaratory judgment (Compl., Count VI) concerns the satisfaction of the very same judgment that Trustmark seeks to enforce, both matters should be consolidated and resolved by the same judge.

Rule 69(a) of the Federal Rules of Civil Procedure holds that the procedure on execution is governed by the law of the state in which the court is located "but a federal statute governs to the extent it applies." New York law provides that an execution may only be issued "before a judgment or order is satisfied." N.Y. C.P.L.R. § 5230(b). New York law also gives the court, on the motion of any interested person, the power to "make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure." N.Y. C.P.L.R. § 5240. Clarendon requests such a protective order, which the Court can grant in order "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the court." *Sanders v. Mfrs. Hanover Trust Co.*, 644 N.Y.S.2d 1017, 1017 (N.Y. App. Div. 1996). New York law does not require that a party show irreparable harm (or any of the other requirements of a preliminary injunction) to obtain a protective order.[2]

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[2] Should the Marshal actually come into possession of Clarendon's property before the Court rules on this motion, N.Y. C.P.L.R. § 5238 provides the Court with similar authority over the Marshal. If that occurs, Clarendon requests

While relief is appropriate under New York law, Clarendon also moves the Court for a ruling that it has satisfied the judgment under Rule 60(b)(5) and for the corresponding stay of execution allowed for under Rule 62(b)(4). Contrary to Trustmark's January 25, 2011 letter to the Court, Rule 62 of the Federal Rules of Civil Procedure is not the exclusive manner for securing a stay of a writ of execution. Rule 62 allows various grounds for a district court to stay execution of a judgment (including an automatic stay after entry of judgment and for stays pending appeal), but it does not purport to supplant all remedies available under state law, such as N.Y. C.P.L.R. § 5240. At all events both state law, in N.Y. C.P.L.R. § 5240, and federal law, in Rules 60 and 62, provide sufficient grounds to stay execution of the judgment.

II. THE COURT SHOULD GRANT A PROTECTIVE ORDER UNDER N.Y. C.P.L.R. § 5240 PREVENTING ENFORCEMENT OF THE JUDGMENT.

The Court should use its broad authority over enforcement procedures, provided by Section 5240, to stop all enforcement proceedings. Section 5240 is "an omnibus section empowering the court to exercise broad powers over the use of enforcement procedures." *Tweedie Constr. Co., Inc. v. Stoesser*, 409 N.Y.S.2d 444, 445 (N.Y. App. Div. 1978). It grants a court "broad discretionary power to control and regulate the enforcement of a money judgment under CPLR article 52 to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the court." *Sanders*, 644 N.Y.S.2d at 1017. A motion under Section 5240 is not, as Trustmark contends, a request for a preliminary injunction. A protective order does not require a showing of irreparable harm, likelihood of success on the merits or any of the other tests for a preliminary injunction. *See id.* It only requires the movant to show "disadvantage or other prejudice." Clarendon asks that the Court prevent the disadvantage and prejudice inherent in allowing Trustmark to collect on a judgment that

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that the funds be frozen with the Marshal, or put into an escrow account, pending determination of the satisfaction issue.

Clarendon contends it has already paid before this Court has had the opportunity to decide Clarendon's claim that it has satisfied that judgment. Any possible prejudice to Trustmark is outweighed by Clarendon's offer to keep a restraining order in effect on a bank account with sufficient funds to satisfy the judgment.

A. The Court Should Prevent Trustmark from Executing on the Judgment Because the Writ of Execution Was Not Validly Issued.

Trustmark's writ of execution was improper because the judgment has already been satisfied and N.Y. C.P.L.R. § 5230(b) allows executions only "[a]t any time before a judgment or order is satisfied." Clarendon explained the propriety of its satisfaction at great length in its summary judgment motions, but will outline those facts and law showing its valid satisfaction again. Clarendon's use of offset to satisfy the amount awarded Trustmark in the 1998 International Treaties arbitration is proper under three legal theories. First, it is proper because it is consistent with the parties' offset arrangement. The offset agreements (contained in the MELEX Settlement Agreement and three "Side Letters") all provide that Trustmark's payments due under the Settlement Agreements would "be offset against a like amount payable, or claimed to be payable, by Clarendon to Trustmark under the [1998 International and VQS] Treaties." (Redpath Decl. ¶ 14 & Exs. 26, 35, 37, & 39; Counterclaim ¶¶ 37, 51, 67, 85.) The Final Award represents the amount actually determined to be payable by Clarendon to Trustmark under the 1998 International Treaties. Clarendon's setoff is in accordance with the original offset arrangement.

Second, Clarendon's use of offset is also appropriate because it is consistent with the arbitrators' ruling. The Final Award recognized Clarendon's right to satisfy by offset by providing that Clarendon could "pay or otherwise satisfy" the amount due. Within thirty days of the Final Award, Clarendon sent a letter to Trustmark stating that it was reducing the amounts

Trustmark owed to it by the $6.6 million Clarendon owed to Trustmark under the Final Award. (Redpath Decl. Ex. 94.)

Third, in any event, the offset is appropriate as a matter of common law. New York law allows setoff when debts are mutual and liquidated. *Westinghouse Credit Corp. v. D'Urso*, 278 F.3d 138, 149 (2d Cir. 2002); *Beecher v. Peter A. Vogt Mfg. Co.*, 125 N.E. 831, 833 (N.Y. 1920). New York law allows, as here, a party to satisfy a judgment with a liquidated claim. *D&B Enterprises No. 2 v. Cablam Inc.*, 729 N.Y.S.2d 239, 240 (N.Y. Sup. Ct. 2001). New York law is consistent with the United States Supreme Court's recognition that "[t]he right of setoff (also called 'offset') allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding the 'absurdity of making A pay B when B owes A.'" *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 18, 18 (1995) (quoting *Studely v. Boylston Nat'l Bank of Boston*, 229 U.S. 523, 528 (1913)). Here, the debts are mutual: Trustmark owes Clarendon under the Settlement Agreements and Clarendon owes Trustmark under the Second Corrected Final Award. The debts are also liquidated: Trustmark owes $10.1 million due under the Settlement Agreements, plus applicable interest, and Clarendon owes $6.6 million under the Final Award. Clarendon's satisfaction by offset merely avoided the absurdity of Clarendon paying Trustmark $6.6 million when Trustmark owes Clarendon over $10.1 million. Trustmark apparently wants the absurdity of making Clarendon pay it $6.6 million just so it can then pay $10.1 million back to Clarendon.

B. At a Minimum, the Court Should Stay Execution of the Judgment Pending Resolution of the Satisfaction Issue.

At the very least the execution should be stayed to allow the Court the opportunity to rule on the issue of Clarendon's satisfaction. One of the purposes of Section 5240, which is to "postpone the enforcement of a judgment until such time that its enforcement is more properly sought." *Kolortron Systems, Inc. v. Casey*, 500 N.Y.S.2d 36 (N.Y. App. Div. 1986). In this case, enforcement is more properly sought, if at all, after the Court has determined Clarendon's claim for a declaratory judgment that it has satisfied the arbitration award underlying the judgment. New York courts have stayed judgments in exactly these circumstances without the need for showing irreparable harm. *See, e.g.*, *Susan Ives, New York, Ltd. v. Base Lodge, Inc.*, 359 N.Y.S.2d 1001 (N.Y. App. Div. 1974) (staying execution of judgment while separate litigation between same parties proceeds); *Sverdlove v. Merrill Lynch, Pierce, Fenner & Smith*, 294 N.Y.S.2d 823 (N.Y. Civ. Ct. 1968) (same).

New York courts do not analyze the issue as a preliminary injunction requiring a showing of likelihood of success on the merits, irreparable harm, and the public interest. They simply require a showing that the two lawsuits are related such that it is equitable for the judgment from the first lawsuit to be stayed while the second lawsuit proceeds. In *Ives*, the court stayed execution on a judgment because the defendant had started separate litigation against the plaintiff which was "inextricably intertwined" with the plaintiff's claims. 359 N.Y.S.2d at 1002. The court did not require any showing of irreparable harm; it only required that the defendant "provide an undertaking securing payment of the judgment." *Id.* at 1001-02. Clarendon has offered to undertake for securing payment by allowing the freeze on its account to remain in place. Similarly, the *Sverdlove* court stayed the execution of a judgment, without even providing for security, because the defendant in the case had started a separate lawsuit against the plaintiff that involved interrelated issues. 294 N.Y.S.2d at 823. Trustmark's attempt to distinguish the *Sverdlove* case because it involved a court staying its own judgment is unpersuasive. Clarendon is asking this Court to stay execution of a judgment that was registered in this Court and a writ of execution issued by this Court.

A stay is also consistent with the directions of the court that entered the judgment Trustmark seeks to enforce. In the confirmation proceeding, Trustmark argued to the confirmation court that Clarendon would have to raise its claims in this Court "because the parties chose the State and Federal Courts of New York to decide them." (Scher Aff. Ex. B at 1-2.) Trustmark got what it asked for from the confirmation court. Judge Coar declined to get into the satisfaction issue and directed Clarendon to file a declaratory judgment action (like this one) or to raise the issue in an enforcement action to determine the propriety of its satisfaction by offset. 2009 WL 4043110, *4.

Now Trustmark seeks to preclude Clarendon from litigating the satisfaction issue in either of the two ways directed by Judge Coar (even in the forum that Trustmark said was exclusive). In effect, Trustmark would preclude Clarendon from litigating the satisfaction issue at all. If Trustmark's position is accepted, Trustmark could execute on the judgment before Clarendon's declaratory judgment claim is decided, thus precluding Clarendon from litigating the issue before it becomes moot. At the same time, Clarendon would be prevented from raising satisfaction as a defense in an "enforcement action" (the alternative manner directed by the confirmation court) if this Court accepts Trustmark's position that it has no power to stay execution. Effectively, no party could ever satisfy a judgment by offset with a liquidated claim because the judgment creditor could simply execute on the judgment and the judgment debtor would have no ability whatsoever to litigate its claim. This is in direct conflict with New York law, which allows satisfaction by offset against liquidated claims. *D&B Enterprises*, 729 N.Y.S.2d at 240.

III. THE JUDGMENT HAS BEEN SATISFIED UNDER RULE 60(B)(5) AND EXECUTION SHOULD BE STAYED UNTIL THE COURT CONSIDERS THE RULE 60(B)(5) MOTION

The Court has ample authority under N.Y. C.P.L.R. § 5240 to grant the relief that Clarendon seeks. Clarendon also moves the Court under Rule 60(b)(5) for relief from the judgment because "the judgment has been satisfied." Clarendon's declaratory judgment claim is the functional equivalent of the Rule 60(b)(5) motion because it asks for a declaration that Clarendon satisfied the arbitration award on which the judgment is based. (*See* Compl., Count VI.) As noted above, Clarendon has validly satisfied the judgment Trustmark seeks to recognize. Trustmark owed Clarendon over $10.1 million, while Clarendon owed Trustmark $6.6 million. Whether styled as a claim for declaratory judgment or a motion under Rule 60(b)(5), Clarendon has asked this Court to declare the judgment satisfied. Under Rule 62(b)(4), this Court has the authority to stay execution pending resolution of Clarendon's Rule 60(b)(5) motion.

This Court, as a court in which the judgment is registered, has the authority to rule on a Rule 60 motion. *See Covington Indus., Inc. v. Resintex A.G.*, 629 F.2d 730, 732 (2d Cir. 1980) (recognizing that Rule 60 motions can be made to the court in which a judgment is registered). As the *Covington* court stated, "since by registering the judgment in a particular forum the creditor seeks to utilize the enforcement machinery of that district court it is not unreasonable to hold that the latter court has the power to determine whether relief should be granted the judgment debtor under 60(b)." *Id.*, quoting 7 Moore's Federal Practice § 60.28(1) at 391-92 (2d ed. 1979). This reasoning is particularly strong in this case, where Trustmark argued to the Northern District of Illinois that it had no authority to rule on the issue of satisfaction and that Clarendon had to raise its satisfaction in this Court "because the parties chose the State and Federal Courts of New York to decide them." (Scher Aff. Ex. B at 1-2.)

In this case, the registering court is in a much superior position to the entering court to rule on the Rule 60(b)(5) motion. The judgment at issue in this motion was entered upon the confirmation of an arbitration award. The court that entered the judgment specifically held that it was not ruling on the satisfaction issue because of the limited nature of confirmation proceedings. 2009 WL 4043110, *4. The court directed Clarendon to file a declaratory judgment, which it did in this Court due to forum selection clauses in the underlying Settlement Agreements. *Id.* This Court has received the evidence relating to the satisfaction issue in the parties' motions for summary judgment, evidence that the confirmation court refused to consider. These facts distinguish this case from the typical case in which the court that issued the judgment is the proper forum for a Rule 60 motion.

As a result, this Court should rule on the Rule 60 motion and not the entering court. This is not a case in which the registering court has had no substantive involvement with the case and the court that entered the judgment is in a better position to evaluate the motion because it has heard all of the evidence. *See United States v. Fluor Corp.*, 436 F.2d 383 (2d Cir. 1970) (upholding transfer of a Rule 60(b)(5) motion because "the Arizona court was already familiar with the issues, the interests of judicial administration commend that court as an eminently suitable forum for further related proceedings"). This Court should decide the Rule 60(b)(5) motion because Clarendon's declaratory claim for satisfaction has been before this Court for over one year and this Court has received the evidence relating to that claim in the motions for summary judgment.

The Court should exercise its discretion to stay any execution on the judgment under Rule 62(b)(4), which allows the Court to stay enforcement of the judgment pending resolution of a motion under Rule 60. *See* 12 Moore's Federal Practice, § 62.04 at 62-13 (3d ed.

2010) (decision to grant a Rule 62(b) stay is "in the discretion of the court"). Clarendon has offered to keep its account frozen, thus securing payment to Trustmark, even though Clarendon has already paid the judgment. This is more than sufficient to address Trustmark's objection that Clarendon somehow poses a collection risk and to satisfy Rule 62(b)'s requirement that the stay grant "appropriate terms for the opposing party's security." *See Frankel v. I.C.D. Holdings S.A.*, 168 F.R.D. 19, 22 (granting stay upon a posting of security). The *Frankel* court granted such a stay merely upon a showing that the movant had some chance of success on the merits. *Id.* Clarendon has a good chance of success on the merits of its declaratory judgment claim (see, *supra*, Section II.A), a claim that could be mooted in the absence of a stay. A stay coupled with security guarantees Trustmark payment if the Court rules against Clarendon (obviating Trustmark's objection that Clarendon is a collection risk) while still allowing the Court the necessary time to consider Clarendon's satisfaction claim. Clarendon requests that the Court enter this common sense solution which Trustmark has inexplicably refused to entertain.

CONCLUSION

For the foregoing reasons, the Court should enter a protective order preventing enforcement of the judgment under N.Y. C.P.L.R. § 5240, grant Clarendon relief from the judgment under Rule 60(b)(5), and stay execution under Rule 62(b)(4) until the Rule 60(b)(5) motion is decided.

Dated: New York, New York
January 28, 2011

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